Supreme Court, U.S.
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No. 96-243

In The

Supreme Court of the United States

October Term, 1995

BERNADINE SUITUM,

Petitioner,

v.

TAHOE REGIONAL PLANNING AGENCY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENT TAHOE REGIONAL PLANNING AGENCY

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QUESTIONS PRESENTED

1. Should this Court grant certiorari to consider a Fifth Amendment takings decision where the petition is based upon issues which were not raised in the trial court or appellate court below and therefore not addressed by those courts?

2. Should this Court grant certiorari to consider a petition which does not raise nationally important questions of federal law in light of the uniqueness of TRPA's regulatory scheme as specifically recognized by the Ninth Circuit Court of Appeals in its decision below?

3. Can the trial court make a determination as to whether a taking has occurred where the plaintiff has failed to pursue all economically viable uses of her property?

4. Should this Court grant certiorari to consider a decision of the Ninth Circuit Court of Appeals which does not conflict with any relevant decision of this Court, nor of any decision of any other Circuit Court of Appeals?

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BRIEF IN OPPOSITION OF RESPONDENT TAHOE REGIONAL PLANNING AGENCY

The Tahoe Regional Planning Agency [TRPA], Respondent, respectfully submits this brief in opposition to the Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals, dated August, 1996, filed herein by Petitioner Bernadine Suitum [Mrs. Suitum], which petition was received by Respondent on August 14, 1996.

I

STATEMENT OF THE CASE

A. NATURE OF THE CASE

Petitioner, Mrs. Suitum, seeks to overturn the decision of the Ninth Circuit Court of Appeals affirming the Order of the United States District Court for the District of Nevada granting summary judgment in favor of Respondent, TRPA. The District Court found that Mrs. Suitum's takings, equal protection and substantive due process claims were not ripe because of her failure to attempt to transfer her development rights as provided for in TRPA's regulations.[1]

B. MRS. SUITUM'S PROPERTY

Mrs. Suitum is the owner of a single family residential lot in Incline Village, Washoe County, Nevada, which lies within the Tahoe Basin and is regulated by TRPA.

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[1] The term "development rights" includes a residential development right, bonus residential development rights, a residential allocation and land coverage.

Mrs. Suitum acquired her property in 1972. Court Record [CR] 1 – Complaint at 2:13-17. Mrs. Suitum's property is classified by TRPA as being located within a Stream Environment Zone [SEZ], which is a classification established by TRPA based upon the environmental sensitivity of the parcel. An SEZ generally conveys surface water from upland areas into Lake Tahoe and its tributaries. Appendix A to Petition, at 5. The role of an SEZ in the cleansing of run-off is integral to the preservation of Lake Tahoe's water clarity. CR 66 – Scholley Aff., Ex. "A" p. 75. Lake Tahoe is universally acclaimed as a national treasure. *See Lake Country Estates v. Tahoe Planning Agcy.*, 440 U.S. 391 at 393-394, 59 L.Ed.2d 401, 99 S.Ct. 1171 (1979); *Kelly v. TRPA*, 109 Nev. 638 at 649, 855 P.2d 1027 (1993), *cert. denied*, 510 U.S. 1041, 114 S.Ct. 684 (1993). The riparian vegetation of an SEZ is important for many reasons, including treatment of runoff and maintenance of soil stability. CR 66 – Scholley Aff., Ex. "A" p. 76.

The classification of Mrs. Suitum's parcel as an SEZ prohibits construction of a new single family dwelling thereon. There are, however, other economic uses of Mrs. Suitum's property. These include the transfer of development rights as provided under TRPA's 1987 Regional Plan. Apparently it is Mrs. Suitum's position, as first revealed in her Petition for Writ of Certiorari, that restrictions which prevent desired construction upon property constitute a "taking" under the Fifth Amendment to the United States Constitution regardless of other uses available to the owner.

C. BACKGROUND OF TRPA

TRPA is a bi-state entity created by an interstate compact in 1969 between the States of California and Nevada. Pub. L. 91-148, 83 Stat. 360; Cal. Gov. Code §66801; NRS §277.200 [1969 Compact]. The 1969 Compact declared Lake Tahoe's waters threatened with deterioration, necessitating the creation of TRPA to adopt and enforce a regional plan of resource conservation and orderly development. 1969 Compact, Art. I.

Due to the failure of the 1969 Compact to cope with the persistent decline in the quality of the lake and its environs, the states, with Congress' approval, extensively amended the document in December of 1980. Pub.L. 96-551, 94 Stat. 3233; Cal. Gov. Code §66801; NRS §277.200 [1980 Compact]. In a tone far more urgent than its predecessor, the 1980 Compact accentuated the mounting threats to the ecology of the region and declared the need to establish environmental threshold carrying capacities and adopt a plan achieving them while providing for orderly growth. 1980 Compact, Art. I(a).

The regulations of which Mrs. Suitum complains are contained in the 1987 Regional Plan [1987 Plan] adopted by TRPA pursuant to the mandate of the 1980 Compact.[2] The keystone of the 1987 Plan, in terms of residential development, is the Individual Parcel Evaluation System

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[2] Earlier TRPA regulations, such as Ordinance No. 81-5, the eight month moratorium following it and TRPA's 1984 Regional Plan are not discussed in the Statement of the Case since they are not relevant to the issues before this Court. A description of the history of TRPA and the evolution of its regulations is set forth in *Kelly v. TRPA, supra*, 109 Nev. at 642-645.

[IPES], a scientifically based system for gradual development of all unbuilt residential lots in the Lake Tahoe Basin, excluding those located in an SEZ. *See generally* CR 66 – Scholley Aff., Ex. B, pp. VII:3-8. The 1987 Plan emphasizes the importance of SEZs and the essential factor which they play in achieving environmental thresholds for water quality, vegetation preservation and soil conservation. *Id.* at p. IV-23. Consequently, the 1987 Plan generally prohibits new residential land coverage on an SEZ.

Once TRPA has determined that a landowner's property is within an SEZ the landowner's first step is to appeal that determination to TRPA's Governing Board. Mrs. Suitum did appeal the parcel's designation as an SEZ under IPES, which appeal was unsuccessful. CR 1, p. 3:14-16. The next step a landowner must take under the 1987 Plan is to make an application to transfer, or at least make reasonable efforts to transfer, the development rights associated with her property. A fairly accurate description of these rights, although somewhat simplified, is set out in the Petition for Writ of Certiorari at pages 6 and 7. It is this step which Mrs. Suitum has not taken. CR 66, Exhibit B at 119:21-28; 120:1-14. Nonetheless, until Mrs. Suitum at least makes a reasonable effort to transfer her development rights, the trial court is unable to determine how TRPA's regulations apply to the property in question, or whether the property has been deprived of all of its economically beneficial or productive use.

This action concerns the application of TRPA's 1987 regulations to Mrs. Suitum's property. Mrs. Suitum has not contested that TRPA's regulations are rationally

related to a legitimate governmental interest. In fact, the Nevada Supreme Court after extensively reviewing the 1987 regulations specifically held that TRPA's regulations are rationally related to a legitimate governmental interest. *Kelly v. TRPA, supra,* at 649.

D. THE DECISIONS BELOW

Mrs. Suitum initiated an action in the United States District Court for the District of Nevada [the District Court] on January 28, 1991, alleging various constitutional deprivations, including allegations that TRPA had "taken" her property without just compensation and that she was entitled to civil damages under 42 U.S.C. section 1983. *See generally* CR 1. During the ensuing two years, the District Court dismissed various causes of action and released the other two defendants from the action. After extensive discovery TRPA filed a Motion for Summary Judgment based upon *inter alia* the following grounds:

1. Mrs. Suitum's takings, substantive due process and equal protection claims for relief were not ripe for adjudication due to her failure to participate in the TDR program under the 1987 Regional Plan.

2. Mrs. Suitum had no claim on the merits for a violation of substantive due process or equal protection because TRPA's regulations, as a matter of law, are rationally related to the legitimate state interest of protecting Lake Tahoe.

3. Mrs. Suitum has no independent claim under the Civil Rights Act, 42 U.S.C. section 1983, because that statute is remedial only and depends upon Mrs. Suitum's

ability to state and prove an independent substantive constitutional violation.

Mrs. Suitum responded to the motion by arguing that:

1. She did not have sufficient time to market her development rights prior to filing suit because the statute of limitations would have barred the action.

2. She is not required to exhaust every administrative remedy.[3]

3. Even if TRPA's regulations are reasonably related to a legitimate state interest, she is entitled to compensation for the "taking" of her property.

After reviewing the issues, the District Court entered its order on November 23, 1993, directing that additional briefing was necessary concerning the transferable development rights [TDR] program under TRPA's 1987 Plan. As ordered by the court additional briefing was filed. Mrs. Suitum argued that the development rights under TRPA's 1987 Plan had no value and that the TDR program was a sham. Mrs. Suitum therefore argued that marketing these rights was futile and not required to establish ripeness under *Kinzli v. City of Santa Cruz*, 818 F.2d 1449 (9th Cir.), *amended*, 830 F.2d 968 (1987). In support of her claim Mrs. Suitum filed the affidavit of a former employee of TRPA, Paul Kaleta. TRPA responded to Mrs. Suitum's claim of futility by submitting affidavits demonstrating

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[3] By arguing that Mrs. Suitum need not exhaust every administrative remedy, her counsel apparently confused the doctrine of ripeness with that of exhaustion of administrative remedies.

that development rights under TRPA's plan have marketable value, and that Mrs. Suitum's alleged expert was not qualified to state opinions regarding the value of the development rights. The District Court agreed with TRPA and rejected Kaleta's affidavit. The trial court concluded that Mrs. Suitum's takings, substantive due process and equal protection claims were not ripe for adjudication. The court held that because Mrs. Suitum had failed to pursue transfer of her development rights there was an insufficient basis upon which the trial court could determine how TRPA's regulations apply to her property and whether the regulations go so far as to effect a taking.

Mrs. Suitum appealed the District Court's decision to the Ninth Circuit Court of Appeals. Mrs. Suitum once again argued that her claims in the District Court were ripe because the TDR program is futile. She also argued that since she had filed an affidavit stating that the development rights lack value, a genuine issue of fact exists which should prevent the entry of summary judgment. The Ninth Circuit upheld the lower court's decision to disregard the Kaleta affidavit. It went on to affirm the lower court. The Ninth Circuit recognized the uniqueness of TRPA's regulatory system and concluded that transfers of development rights is a use of SEZ property within that scheme. Appendix A at 9.

Until Mrs. Suitum uses the property in the manner permitted by the regulations the trial court is unable to make a determination as to whether a "taking" has occurred.

II

REASONS FOR DENYING THE PETITION

A. SUMMARY

The Petition for Writ of Certiorari should be denied. The issues raised are not nationally significant; nor are they likely to recur. Moreover, these issues are raised for the first time to this Court, and were not addressed by the courts below. Finally, the decision of the Ninth Circuit is consistent with this Court's prior decisions as well as those of the other Circuits.

B. THE ISSUES PRESENTED IN THE PETITION WERE NOT RAISED IN THE LOWER COURTS.

The petitioner in this matter has alleged that TRPA's unique regulatory scheme has amounted to a taking of her property. As a component of this argument petitioner maintains that TRPA has denied all use of her property by prohibiting her from building a house on her land and that the sale of development rights is irrelevant. Nowhere below did the petitioner argue that restrictions prohibiting construction on land amount to a taking per se as now argued in the petition. While Mrs. Suitam did argue that her development rights had no value, she never asserted the proposition that the only use of property was the ability to construct a residence on it.

Likewise petitioner never maintained, prior to the filing of this petition, that "The Final Decision Ripeness Doctrine is Satisfied When the Economic Impact of the

Regulation on the Subject Property is Established – Regardless of Whether an Actual Market Transaction has Occurred." Instead petitioner has consistently maintained that her development rights have no value, or in the alternative that a genuine issue of fact exists as to their value.

The District Court and the Ninth Circuit were therefore deprived of the right to address the issues now raised by petitioner for the first time. In other words Mrs. Suitum has embarked on a new and uncharted strategy through the filing of the instant petition. The problem with Mrs. Suitum's tactics is that the lower courts were not given a fair opportunity to weigh the merits of that strategy. This Court has held that issues raised for the first time through a petition for writ of certiorari will ordinarily not be considered by this Court. *Youakim v. Miller*, 425 U.S. 231 (1975); *Duignan v. United States*, 274 U.S. 195, 200 (1927). The Petition for Writ of Certiorari should therefore be denied on the basis that petitioner failed to raise the issues presented therein in the courts below.

C. THE ISSUES PRESENTED IN THIS PETITION ARE NOT NATIONALLY IMPORTANT QUESTIONS OF FEDERAL LAW.

Petitioner has alleged that the issues argued in her petition are important questions of federal law and therefore should be reviewed by this Court. While the issues presented in her petition are of obvious importance to the litigants, they do not rise to the level of nationally important federal questions. This Court has long recognized

that utilization of transferable development rights is a use of property which may negate a takings claim. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 at 137 (1987).

TRPA's 1987 Plan sets forth an unique program specifically designed for the regulation of development within the Tahoe Basin. The 1987 Plan also includes an "elaborate system of transfers of development rights which allows for transfers of land coverage, residential development rights, and residential allocations." Appendix A at 5. As such it is unlike any other program in the country.

The Ninth Circuit recognized the unique nature of TRPA's regulations by stating as follows:

> We recognize that TRPA's regulatory scheme is *unique* and conclude that within that scheme, transfer of development rights is a use of SEZ property.
>
> [Emphasis Supplied] Appendix A at 9.

Given the unique nature of TRPA's regulatory system and its application solely to the Tahoe Basin, this Court should deny certiorari since no questions of nationally important federal law, as contemplated by Supreme Court Rule 10(a), have been raised.

D. THE DECISION OF THE NINTH CIRCUIT DOES NOT CONFLICT WITH THE RELEVANT DECISIONS OF THIS COURT.

As a basis for her Petition, Mrs. Suitum asserts that the decision of the Ninth Circuit conflicts with prior relevant decisions of this Court. Petitioner's assertion is

incorrect since the Ninth Circuit's decision is consistent with this Court's prior rulings. TRPA will address each of the cited decisions in turn.

1. *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).

Petitioner argues that the decision of the Ninth Circuit finding that development rights constitute a use of her property violates this Court's holding in *Williamson, supra*. The thrust of Petitioner's argument is that *Williamson* requires only that a final decision concerning permitted construction on the property be made in order for the case to be ripe. In other words, even if Mrs. Suitum's property has substantial economic uses it is still "taken" if regulations prohibit Mrs. Suitum from building a house on it. *Williamson*, however, does not support Mrs. Suitum's assertions. Nowhere in *Williamson* does this Court state that the only use of property is physical construction on said property. Rather, this Court continually refers to a method of deriving economic benefit from the property as opposed to a means of utilizing the property by placing a structure on it. Indeed, the Court in *Williamson* referred to the finding in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), that:

> the property owners had not sought approval for any other plan, and it therefore was not clear whether the Commission would deny approval for all uses that would enable the plaintiffs to derive *economic* benefit from the property.
>
> [Emphasis Supplied] *Williamson, supra*, at 187

Additionally, *Williamson* cites *Penn Central* for the rule that "this Court consistently has indicated that

among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment backed expectations." *Williamson* at 191. Once again, no reference is made to physical development being required, rather the emphasis is on the economic uses that the property retains.

The *Williamson* Court further stated that:

> Viewing a regulation that "goes too far" as an invalid exercise of the police power, rather than as a "taking" for which just compensation must be paid, does not resolve the difficult problem of how to define "too far," that is, how to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession. As we have noted, resolution of that question depends, in significant part, upon an analysis of the effect the Commission's application of the zoning ordinance and subdivision regulations had on the value of respondent's property and investment-backed profit expectations.
>
> *Id.* at 200.

Once again, the emphasis is upon the "value" of the property and "investment-backed profit expectations". Noticeably absent is the requirement for physical construction, as argued by Petitioner.

In *Williamson* this Court therefore held that "until the Commission determined that no variances will be granted, it is impossible for the jury to find, on this record, whether respondent 'will be unable to derive

economic benefit' from the land." *Id.* at 191. Likewise, in the case at bar, until Mrs. Suitum reasonably pursues transfer of her development rights, it is impossible for the trial court to determine whether Mrs. Suitum "will be unable to derive economic benefit from the land."

2. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986).

As with *Williamson* the petitioner has misstated this Court's holding in *MacDonald* regarding what constitutes a "taking" of property. Once again this Court, in *MacDonald*, clearly held that the economic impact of the regulations, rather than the limitation of actual construction on the property is central to a takings analysis. This Court stated:

> Our cases have accordingly "examined the taking question by engaging in essentially ad hoc, factual inquiries that have identified several factors – such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the governmental action – that have particular significance."
>
> *MacDonald*, 477 U.S. at 349, Citing *Kaiser Aetna v. United States*, 444 U.S. at 175, 100 S.Ct., at 390.

Similarly this Court cited with approval the holding in *Williamson*, wherein this Court stated that the proper inquiry regarding a taking is the effect the regulation has on the value of respondent's property and "investment backed profit expectation." *MacDonald*, 477 U.S. at 349. Nowhere does this Court state that permission to physically construct a building on the site is necessary to avoid a taking.

Indeed, this Court pointed out that in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), the existence of a "development right" which could be transferred negated the finding of a taking in that case. *MacDonald*, 477 U.S. at 352. In the instant case evidence was presented to the District Court by TRPA that the development rights available for transfer by Mrs. Suitum have market value thereby negating her claim of futility. Since the property can be used by Mrs. Suitum to receive economic benefit, there can be no determination as to whether a taking has occurred until she makes reasonable efforts to transfer her development rights.

3. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886 (1992).

Finally, petitioner claims that the Ninth Circuit's decision nullifies the categorical taking doctrine in *Lucas*.

This Court in *Lucas* held that when property is deprived of "all economically beneficial or productive use" a categorical taking occurs for which compensation must be paid, unless the regulatory agency can show that the restrictions placed on the land are consistent with common law nuisance abatement. Thus, in order to determine whether a categorical taking has occurred the trial court must determine if the land has been deprived of "all economically beneficial or productive use". The petitioner maintains that the "economically beneficial or productive use" discussed in *Lucas* means the ability to construct a dwelling or other structure on the land. In support of this conclusion petitioner points to a statement made by Justice Scalia in *Lucas*:

> . . . [R]egulations that leave the owner of land without economically beneficial or productive options for its use – typically, as here, by requiring land to be left substantially in its natural state – carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.
>
> *Lucas, supra*, 505 U.S. at 1018.

Far from indicating that use means physical construction on the property, *Lucas* recognizes that while construction is a common use of property, it is not the only use contemplated in takings analysis. Rather, a trial court must look to see if the property retains any "economically beneficial or productive option for its use". Clearly this refers to the economic impact of the regulation on the property. In *Lucas* it was undisputed that the property was rendered valueless by the regulations at issue, however petitioner has conceded that the property in the case at bar retains economic options.

The other statement relied upon by petitioner in *Lucas* is as follows:

> It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the "essential use" of land, *Curtin v. Benson*, 222 U.S. 78, 86, 32 S. Ct. 31, 33, 56 L.Ed. 102 (1911).
>
> *Lucas, supra*, 505 U.S. at 1031.

Petitioner's reference to this quotation is taken out of context. The quotation refers to this Court's analysis of common law principles of nuisance and not the rules

connected with takings law. This Court was discussing whether the South Carolina courts were likely to find that the State's regulation of Lucas' property would be found to be a nuisance. It does not establish, as argued in the petition, that this Court held that a categorical taking occurs when a regulation prohibits building upon a parcel of land. Since Mrs. Suitum has an economic use for her land, as found by the Ninth Circuit and the District Court, her case is not ripe for adjudication and does not fall within the ambit of the *Lucas* categorical taking doctrine.

It should also be noted Mrs. Suitum has never made the assertion, prior to the instant petition, that her property was categorically taken under the *Lucas* doctrine. She should not be permitted to assert it now.

E. THE TRIAL COURT CANNOT MAKE A DETERMINATION AS TO WHETHER MRS. SUITUM'S PROPERTY HAS BEEN TAKEN UNTIL SHE AVAILS HERSELF OF THE REGULATORY SCHEME PROVIDED.

Mrs. Suitum argues in her petition that she need not market her development rights because their value can be established through expert testimony and that TRPA need not take any further action concerning the regulation of her property. This curious argument was first asserted in the instant Petition for Writ of Certiorari. Prior to petitioning this Court, Mrs. Suitum steadfastly maintained that her development rights are worthless and that attempting to market them would be futile.

Mrs. Suitum relies on *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053, 107 S.Ct. 926, 93 L.Ed.2d 978 (1987), for the proposition that valuations are performed all of the time by the courts based solely upon expert testimony. Nonetheless in *Florida Rock* the plaintiff had availed itself of all of the regulatory options prior to bringing its taking claim. This Court in *Williamson*, held that a takings claim is not ripe for adjudication " . . . until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson*, 473 U.S. at 186. Petitioner concedes in her petition that TRPA must undertake an approval process in order for her to transfer her development rights. Petition for Writ of Certiorari at p. 20. Therefore Mrs. Suitum has not received a "final decision" concerning the use of her property and her claim is not ripe for adjudication. Mrs. Suitum's argument makes no more sense than to argue that the court in *Williamson, supra,* should have speculated on the likelihood that a variance would be granted.

In any case, Mrs. Suitum has raised an issue through a Petition for Writ of Certiorari which should have been raised at the trial level. This issue is not of national significance and should not justify the granting of Certiorari under Supreme Court Rule 10.

F. THE DECISION OF THE NINTH CIRCUIT DOES NOT CONFLICT WITH THE DECISION OF THE SEVENTH CIRCUIT.

Finally, Petitioner claims that the Ninth Circuit's decision in the instant case conflicts with the decision of the Seventh Circuit in the case of *Marusic Liquors, Inc. v. Daley*, 55 F.3d 258 (7th Cir. 1995). The petitioner misunderstands the decision in *Marusic*. Citing *Williamson Planning Comm'n v. Hamilton Bank, supra*, the Seventh Circuit noted that "[a] claim is ripe when 'the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.' . . . That aptly describes Marusic's circumstances: the ordinance itself embodies a conclusive decision about transferability." *Marusic*, 55 F.3d at 261.

In the instant case, however, the Ninth Circuit found that the regulations were not conclusive as to Ms. Suitum's property, holding that:

> "without pursuit of the transfer of development rights, we cannot know whether the regulations have gone too far because at this point, no one knows how far the regulations have gone. *MacDonald*, 477 U.S. at 348. Without attempting to transfer the rights she currently possesses, Suitum cannot know the 'nature and extent of permitted development[,]' *Kinzli*, 818 F.2d at 1453, and thus cannot know the regulations' full economic impact or the degree of their interference with her reasonable investment-backed

> expectations, two critical components of a regulatory taking claim analysis. *Youpee v. Babbitt*, 67 F.3d 194, 197 (9th Cir. 1995).
>
> *Suitum*, Appendix A at 9.

Indeed, the Seventh Circuit in *Marusic* correctly noted:

> A claim is unripe when critical elements are contingent or unknown. When for example, a property owner alleges that general regulation affects his land in some special way, the claim is not ripe until all efforts to avoid the restriction or obtain compensation for it have been exhausted. [*citations omitted.*]
>
> *Marusic*, 55 F.3d at 260.

In light of the above it is clear there is no conflict between the Circuits and therefore the petition should be denied.

III

CONCLUSION

TRPA's regulatory scheme is unique and too particular to the Tahoe Basin to bear upon nationally prominent issues. The Ninth Circuit's decision is consistent with the prior rulings of this Court, as well as that of other Circuits. Additionally, the petition raises new issues which

were not addressed in the courts below. Mrs. Suitum's petition, therefore, should be denied.

DATED: September 13, 1996

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